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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

THOMAS TULLOCK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED

I

DOES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRE THE EXCLUSION OF EVIDENCE THAT IS OBTAINED BY POLICE OFFICERS WHO HAVE LEFT A COMMON ACCESS DRIVEWAY FOR A LEGITIMATE PURPOSE AND LOOKED INTO A WINDOW OF AN ATTACHED GARAGE FROM THE FRONT LAWN?

II

SHOULD THE "INEVITABLE DISCOVERY" DOCTRINE BE GIVEN A BROADER APPLICATION IN THOSE CASES INVOLVING REASONABLE POLICE CONDUCT WHEREIN THE DETTERENCE RATIONALE OF THE EXCLUSIONARY RULE IS OF LESS IMPORT?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE PEOPLE OF THE STATE OF MICHIGAN,

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COMES, the State of Michigan, Petitioner, through JAMES J. GREGART Prosecuting Attorney for the County of Kalamazoo, MICHAEL H. DZIALOWSKI, Chief of the Appellate Division and PATRICIA N. CONLON, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on November 17, 1987, leave to appeal denied by the Michigan Supreme Court on March 7, 1988.

OPINIONS BELOW

The second opinion of the Michigan Court of Appeals, docket no. 98519, is unreported and appended below as Appendix "A". The Order of the Michigan Supreme Court, docket no. 82191, denying Leave To Appeal is unreported and appended below as Appendix "B". The first opinion of the Michigan Court of Appeals, docket no. 75531, is unreported and appended below as Appendix "C".

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on November 17, 1987. The Michigan Supreme Court entered judgment on March 7, 1988. This Court's jurisdiction is invoked under 28 USC, sec 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF CASE

On October 5, 1980, William Michael Olds was hit and killed by a motor vehicle as he was walking along a road in Kalamazoo County. The driver of the automobile did not remain at the scene. Through various tips, the police received information that Thomas Tullock drove a car similar to the one that had been seen at the accident. Three police officers proceeded to the home of Mr. Tullock to obtain information about this automobile.

When they arrived at the house, no one was at home, and the officers split up to cross the lawn

of the Tullock residence intending to speak to neighbors on either side. The Tullock house was L-shaped with the garage front door facing the driveway. A six foot wide window located on the side of the garage actually faced the front lawn of the residence. As two of the officers passed this window they noticed the vehicle that they had been looking for inside the garage. The officers were able to obtain enough information about this automobile looking through the uncurtained window to draw up a search warrant for the seizure of this motor vehicle.

On November 23, 1983, a pretrial hearing was held on Defendant's Motion to Quash the Search Warrant and Suppress Evidence Illegally Seized and Motion To Dismiss the Charges. At the hearing on the motions, the trial court granted Defendant's Motion To Suppress the evidence seized under the search warrant and the Defendant's Motion to Dismiss. This matter has never been to trial.

The trial court suppressed the evidence in this case based on its determination that the police

officers were trespassing at the time they looked in the garage window:

> "They had to trespass where they had no right to be. They had no right to cross the People's property, whether it was to go over to the neighbors or whether it was just to snoop around for evidence. They were trespassing." (Transcript, p. 160)

In a September 26, 1985, unpublished opinion, the Michigan Court of Appeals affirmed the decision of the trial court ruling that People v Dugan, 102 Mich App 497; 302 NW2d 209 (1980); lv den 411 Mich 989 (1981) was controlling. The Dugan case was based on a trespass approach to Fourth Amendment protection.

On August 25, 1986, the Michigan Supreme Court remanded the present case to the Court of Appeals for reconsideration in light of its ruling in People v Houze, 425 Mich 82; 387 NW2d 807 (1986). On October 31, 1986, the Michigan Court of Appeals affirmed their prior holding in this case without further arguments or briefs from either party. On

February 10, 1987, the Michigan Supreme Court again remanded this case to the Michigan Court of Appeals for further consideration in light of People v Houze, supra, with a directive to explain the application of Houze to the present case. After further briefs were filed and oral argument heard, the Michigan Court of Appeals on November 17, 1987, again affirmed the trial court's suppression of the evidence. It is important to note that the author of the Court of Appeals opinions in both Dugan, supra and Houze, supra, sat on the panel for the present case. The decision in all three cases at the Court of Appeals level, was based on a trespass interpretation of Fourth Amendment protection even though the Michigan Supreme Court in Houze discredited such an approach.

On March 7, 1988, the Michigan Supreme Court denied leave to appeal, "because we are not pursuaded that the questions presented should be reviewed by this court."

REASONS FOR GRANTING THE WRIT

This is a Negligent Homicide case which has never been to trial because both the trial court and Michigan Court of Appeals refused to recognize the transition in Fourth Amendment analysis from that of property rights to that of reasonable expectation of privacy. Further, this Court has yet to address the question of the police officer who may have committed a "technical trespass" when he is viewing the evidence. There are cases at the Federal Appellate Level which clearly support Petitioner's position in this matter. However, as long as there is no clear United States Supreme Court ruling on the issue of "technical trespass", the matter remains unsettled in State Courts. The result is an injustice promulgated by state court decisions excluding evidence and preventing wrong-doers from facing appropriate charges.

The public perception of the criminal justice system is not enhanced by a suppression and dismissal based on a mere "technical trespass".

This matter is an appropriate factual situation for the highest court to analyze in terms of Fourth Amendment protections and guidelines. Police officers who stand on a front lawn which can be traversed by the general public have committed no crime. If this court were to determine that it was not a Fourth Amendment violation for the police officers to stand on the front lawn, the behavior of the police officers from that point on is acceptable under Fourth Amendment standards.

There has also been no direction from this court as to what facts must be in the record before the inevitable discovery doctrine applies. For this doctrine to peacefully coexist with the Exclusionary Rule, public interest demands a threshold inquiry into the reasonableness of police action along with an analysis of potential independent discovery.

A.

In United States v Whaley, 779 F2d 585 (11th Cir. 1986), the Court held that the reasonableness

of an expectation of privacy is logically dependent on the degree to which the locale is viewable by members of the public without visual aids. In that case, the defendant's argument that his uncurtained windows were protected by the Fourth Amendment because of the secluded position of his home was rejected.

In United States v Knight, 451 F2d 275 (5th Cir. 1971), cert den 92 S Ct 1171 (1972), the court considered the trespass of officers who not only approached a garage but entered it:

> The entry upon Luckett's property, even if made without probable cause, does not necessarily constitute a trespass. When the performance of his duty requires an officer to enter upon private property, his conduct, otherwise a trespass, is justifiable.

In the present case, the officers crossed the front lawn, not for the purpose of searching for evidence, but rather to talk to neighbors in the course of their investigation. To say that a neighbor, newsboy or mailman may view what a

police officer may not, gives minor property rights the dignity of a constitutional protection which they do not merit. Such an interpretation is designed to hamper all reasonable police investigations with little thought to the arbitrariness of its persistent position.

Various federal circuits have recognized the "technical trespass" concept as it applies to Fourth Amendment protections: United States v Johnson, 561 F2d 832 (D.C. Cir. 1977); United States v Conner, 478 F2d 1323 (7th Cir. 1972); United States v Hanahan, 442 F2d 649 (7th Cir. 1971). Both Conner and Hanahan held that even if the police officer stepped off the public sidewalk to look into the windows of an unattached garage that this was a mere "technical trespass", and not an unreasonable search. In Johnson, the court found that it was legitimate for a police officer to step off a public walkway and look into a basement window to confirm or negate a tip regarding illegal drug activity.

In United States v Anderson, 552 F2d 1296 (8th Cir. 1977), the court concluded that the legitimate objective of investigating a theft justified the police walking to the rear of a home and looking into a partially covered basement window. The federal courts are in agreement that if the police officers in the present case were justified in crossing the Defendant's lawn, their subsequent viewing of the evidence through the window was not an unreasonable search. For the State of Michigan to hold otherwise, is contrary to the consensus of opinion in federal courts, and an outrageous afront to good faith investigative efforts of police officers in that State. The State of Michigan is not alone in its persistent refusal to depart from the old "trespass" approach to the Fourth Amendment. It is time for this Court to give guidance to the states and federal courts that are called upon to interpret the reasonable expectation premise of Katz v United States, 389 US 347; 88 S Ct 507; 19 LEd2d 576 (1976).

B.

The general public conception of the criminal justice system has not been enhanced by the Exclusionary Rule. That is generally not a primary concern for this Court when dealing with individual constitutional rights. However, when this Court is also dealing with police behavior that is of a good faith character and innocent under acceptable social norms, the suppression of evidence because of that behavior, must be reviewed. In Michigan v Tucker, 417 US 433; 94 S Ct 2357; 41 LEd2d 182 (1974), this Court did place certain restrictions upon the use of the Exclusionary Rule for deterrence purposes:

> The deterrent purpose of the Exclusionary Rule necessarily assumes that the police have engaged in wilful, or at the very least negligent conduct which has deprived defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official

> action was pursued in complete good faith, however, deterrence rationale loses much of its force.

To admit evidence that was illegally seized but would have been inevitably discovered is a corresponding recognition by this court of the disparity that sometimes exists in application of the Exclusionary Rule. Presently the inevitable discovery doctrine does not require a threshold examination of the "good faith" or reasonableness of the police conduct.

The State of Michigan has never once considered the good faith of the police officers in the present case, nor the propriety of the steps across the front lawn. It did, however, reject the "inevitable discovery" argument in its September, 1985, opinion because of the lack of specific facts in the record to support such a claim. This conclusion, ignores the high visibility of an automobile, the likely probability that it would have been observed by neighbors, and the information that state motor

vehicle records would offer regarding ownership. Since the testimony at the suppression hearing was taken in 1983, before this Court's formal approval of the "inevitable discovery" doctrine in Nix v Williams, 467 US 431; 104 S Ct 2501; 81 LEd2d 377 (1984), the Michigan Court of Appeal's ruling is especially harsh. This court in Nix stated that, "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." It is imperative that this Court enhance this premise by the additional phrase, "especially when the police conduct is reasonable under the circumstances."

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the cause for proceedings consistent with this Court's opinion.

Respectfully submitted,

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DATED: April 11, 1988/pan

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS TULLOCK,

Defendant-Appellee.

No. 98519
(On Second
Remand)

BEFORE: M.H. Wahls, P.J., J.H. Gillis and J.H. Shepherd, J.J.

PER CURIAM

This case comes before us for a fourth time. Our further consideration of the case in light of People v Houze, 425 Mich 82; 387 NW2d 807 (1986), as discussed below, convinces us that the trial court did not err in suppressing the challenged evidence. Accordingly, we affirm.

Defendant, Thomas Tullock, was charged with negligent homicide, MCLA 750.324; MSA 28.556, and failure to stop at the scene of a serious personal injury accident, MCL 257.617; MSA 9.2317, based on

a fatal accident which occurred on October 5, 1980, in Oshtemo Township. Originally, the trial court found a search warrant in the case to be invalid on its face due to a failure to show probable cause. In an unpublished, per curiam opinion (Docket No. 59173, rel'd 10/12/83), this court reversed and remanded, finding probable cause and ordering a second evidentiary hearing in order to determine whether the search warrant affiant, a sheriff's deputy, overstepped constitutional bounds in securing the probable cause upon which the search warrant was based. On remand, the trial court conducted an evidentiary hearing and thereafter suppressed all evidence seized on the basis of the search warrant. As a result, defendant's motion to quash the information was granted. This Court affirmed in an unpublished, per curiam opinion (Docket No. 75531, rel'd 9/26/85), citing People v Dugan, 102 Mich App 497, 506; 302 NW2d 902 (1980), lv den 411 Mich 989 (1981). In our opinion, we set forth a summary of the testimony adduced at the second evidentiary hearing in this case:

"Kalamazoo County Sheriff's deputies questioned defendant on October 14, 1980, and then released him. They gleaned from him his home address and then proceeded to his residence in Van Buren County in search of the automobile they suspected was involved in the fatal accident."

"The officers parked their car in defendant's driveway and went to the front door to see if anyone was home. When they received no answer at the front door, they split up, one officer proceeding across the lawn toward the neighbor's house on the right, the other to the left. The avowed purpose in doing so was to ask the neighbors for a description of defendant's motor vehicle. Officer Boughton testified that as he was crossing the lawn he observed the top of a car in defendant's attached garage. He was 10 to 20 feet from the garage window and could not tell the kind of car nor the color. He called to Lt. Van Streain, the search warrant affiant, and proceeded closer to the garage to get a better look at the car. As he got close to the window he saw damage to the top of the windshield and the top of the right side of the vehicle. Van Streain, who was shorter, had to chin himself up to the window's ledge in order to peer into the garage and make the same observations.

"Armed with this information, a search warrant was secured, the car was seized and this case unfolded."

Subsequently, the Supreme Court, in lieu of granting leave to appeal, vacated our judgment and remanded the case for reconsideration in light of People v Houze, supra. 426 Mich 851 (1986). After we issued an order reaffirming our prior

decision (Docket No. 94780, rel'd 10/20/86), the Supreme Court, again in lieu of granting leave to appeal, remanded the case for further consideration in light of People v Houze, supra, and the issuance of an opinion explaining our application of that case to the case at bar. 428 Mich 861 (1987).

In Houze, police officers responded to a radio dispatch that an automobile was being "stripped" (i.e., certain parts were being removed) and that the "[s]ubjects were taking the parts of that car to the garage, rear of 2379 Leslie." The officers found a stripped car and then walked down an alley to the garage at 2379 Leslie, which was approximately three-quarters of a block away. They entered the Leslie property, owned by defendant, and proceeded to the walk-in door on the side of the garage. Through an opening in the door, the officers could see defendant and three others removing parts from a car inside the lighted garage. After entering the garage and discovering that the vehicle had been stolen, the

officers arrested the four men. Defendant was charged with receiving and concealing stolen property over the value of $100. The trial court granted defendant's motion to suppress evidence of the crime, holding that the police officers violated defendant's right to be free from unreasonable searches and seizures by their warrantless entry onto defendant's property. This Court affirmed (2-1), and the Supreme Court reversed and remanded the case for trial.

The Supreme Court, with six justices participating, issued three opinions in Houze. First, Justice Cavanagh, with Justice Riley concurring, wrote that the entry of the police onto defendant's property, even if involving a technical trespass, was not an intrusion on defendant's "reasonable expectation of privacy." See Katz v United States, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). In rendering his opinion, Justice Cavanagh emphasized:

"The police did not enter defendant's home or peer into the windows of his home. Rather, they looked into an unattached garage which abutted a

public alley from a common access route. This entry onto the curtilage and the observation by police into the garage was limited and reasonable under the circumstances."

---

[1] "It is not objectionable for an officer to come upon that part of the property which 'has been opened to public common use.' The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police take the route 'for the purpose of making a general inquiry' or for some other legitimate reason, they are 'free to keep their eyes open,' and thus it is permissible for them to look into a garage or similar structure from that location. [1 LaFave, Search & Seizure §2,3, p 318.]

"Courts have upheld police entries onto driveways, carports, front walks, and porches as nonintrusive. See, e.g., Pistro v State, 590 P2d 884 (Alas, 1979) -- an officer's observation of a stolen car from defendant's driveway; State v Seagull, 26 Wash App 58; 613 P2d 528 (1980), aff'd 95 Wash 2d 898; 632 P2d 44 (1981)--an officer's observation of marijuana plants in a greenhouse twenty feet from house from defendant's back door; United States v Ventling, 678 F2d 63 (CA 8, 1982)--an officer's observation of tire tracks from defendant's driveway and front door; State v Wilbourn, 364 So 2d 995 (La, 1978)--officer's observation of suspect's car in carport from suspect's driveway. In each case, the courts found that the officers' observations were made from a normal means of ingress or egress." (Emphasis added.) 425 Mich 92.

In the opinion authored by Justice Boyle, in which Chief Justice Williams and Justice Brickley

concurred, the result reached by Justice Cavanagh was endorsed on the basis that "defendant had no reasonable expectation of privacy in the common access area from which the police viewed the criminal activity." 425 Mich at 84. And in his dissent, Justice Levin agreed with the majority "that insofar as the officers may have 'walked onto defendant's property' along 'a common access route' of the public ingress and egress, as in the four cases cited in footnote 1 of the concurring opinion [of Justice Cavanagh], there would have been no lawful search," but concluded:

> "The record, however, does not establish that the officers were able to gain access to the side entrance door by walking only onto that portion of defendant's property that was a common access route of public ingress and egress. It does not show that the police traveled a route that a mailman, milkman, or UPS man might have traveled and were able to view the activity in the garage from such a route." (Footnotes omitted.) 425 Mich at 95-97.

Thus, it is clear from the three opinions in Houze that the Supreme Court has recognized a "common access area" rule, under which police entries onto the normal routes of ingress and egress located on

private property do not constitute searches in violation of the Michigan and United States constitutions, Const 1963, art §11; US Const, Am IV.

Applying this "common access area" rule to the facts in the present case, we find that the trial court did not err in suppressing evidence of defendant's damaged automobile on the ground that the police officers who looked into defendant's garage and saw the damaged car had committed an illegal search.

In the present case, police officers decided to walk from defendant's front door to the homes of his neighbors by walking across his front lawn. We have no difficulty in concluding that the driveway and walkway leading up to defendant's front door -- since they apparently were not, for example, cordoned off or posted with "no trespassing" signs -- constituted common access areas. Accordingly, if the officers had seen the damaged car from any point along those areas, no constitutional issue regarding an illegal search

would have arisen. The officers deviated from those areas, however, when they left defendant's front door and walked across defendant's front lawn. We do not believe that a resident's entire front yard may properly be termed a normal route of public ingress and egress. To so hold would, in essence, deprive the resident of any expectation of privacy he may rightfully enjoy in any room in the front of his residence or garage which is not hidden from view by shades, curtains, or other visually obstructing material. Objects and possessions may be intentionally positioned inside one's house or garage such that they cannot be seen from established walkways or paths, but may be visible from other portions of the resident's property. Extending the Houze "common access area" rule to such portions of a resident's private property would eviserate the resident's constitutional right to be secure from unreasonable searches by the judicial determination that a potentially large percentage of the resident's property is in fact open to the

public for ingress and egress. Such an extension we view as not supported by law, experience, or common sense.

We especially find the trial court's suppression of the evidence in this case, as a consequence of the police officers' search of defendant's garage, to be proper because the officers were not merely cutting across defendant's front lawn when they saw the damaged car in the garage but were intentionally walking toward the garage's window after deviating from their avowed direction of perambulation toward defendant's neighbors' residences. Their observation of the damaged car in defendant's garage was thus "twice removed" from the common access areas of defendant's driveway and front walkway in the sense that their walk across defendant's front lawn was a deviation from those areas and their subsequent approach to the garage window was a further deviation from their original deviation. It was only upon his approaching the garage window that Officer Boughton could see the

automobile's color and condition, and it was only upon Lt. Van Streain's chinning himself up to the window's ledge that he could make the same observations. The officers did not observe the incriminating details regarding the car's condition from the vantage of defendant's driveway or front walkway, or even when originally traversing defendant's front lawn during their initial deviation from the common access areas in defendant's front yard.

Although the trial court decided this issue prior to the Supreme Court's opinion in Houze, we note that much of its decision was prescient of the high court's opinion. Although the trial court, while enunciating its findings, did not specifically use the term "common access area," its analysis of the issue was consistent with that rule. For example, the court stated:

"If the car had been parked in front of the house on the public road, if the car had been parked where it was but the garage door was open so that you could look into it from the driveway, then I think -- at least see enough to identify the color and see the damage, ... then I think the officers could have gone down and gotten a search

warrant based upon their observations from a place where they had a right to be, and my finding is they had a right to be in the driveway.

"But that's not the facts that we have here. You had to get around the other side of the house and you had to get up within two paces, even a tall man over six feet tall had to be up within two paces before he could look inside." (Emphasis added.)

Accordingly, our examination of the present case, when viewed in light of the decision in People v Houze, supra, leads us to affirm the trial court's ruling that the search of defendant's garage conducted by the police was illegal and requires the suppression of any evidence obtained therefrom.

Affirmed.

/s/ Myron H. Wahls
/s/ John H. Shepherd

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS TULLOCK,

Defendant-Appellee.

No. 98519
(On Second
Remand)

BEFORE: M.H. Wahls, P.J., and J.H. Gillis and J.H. Shepherd, J.J.

J.H. GILLIS, J. (Dissenting)

I adopt the statement of facts as set forth in the majority opinion. I note that following the most recent Supreme Court remand, the parties filed briefs on the applicability of People v Houze, 425 Mich 82; 387 NW2d 807 (1986). Having reviewed those briefs as well as the various Houze opinions, I would hold that defendant had no reasonable expectation of privacy in the contents of his garage when they were visible to any member of the public walking on defendant's lawn.

Although defendant had a property interest in the land, this was not sufficient to establish a legitimate expectation of privacy concerning the garage's visible contents.

/s/ John H. Gillis

APPENDIX B

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS TULLOCK,

Defendant-Appellee.

SC: 82191
COA: 98519
LC: D 811-069 FY

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Riley, C.J., Boyle and Griffin, J.J., would grant leave to appeal.

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 75531

THOMAS TULLOCK,

Defendant-Appellee.

BEFORE: M.H. Wahls, P.J., and Allen and J.C. Ravitz*, JJ.

PER CURIAM

Defendant was charged with negligent homicide, MCL 750.324; MSA 28.556, and failure to stop at the scene of a serious injury accident, MCL 257.617; MSA 9.2317. Plaintiff appeals by right from the trial court's ruling granting defendant's motion to suppress evidence seized pursuant to a search warrant and from the resulting order of dismissal.

It was charged that the fatal accident involving defendant took place on October 5, 1980,

in Oshtemo Township. On June 30, 1981, the trial court entered its first order finding the search warrant to be invalid on its face due to a failure to show probable cause. In an unpublished, per curiam opinion People v Tullock (Docket No. 59173, rel'd 10/12/83), this Court reversed and remanded, finding probable cause and ordering a second evidentiary hearing. The purpose of the ordered hearing was to determine whether or not the sheriff's lieutenant, who was the affiant for the search warrant, overstepped constitutional bounds in securing the probable cause upon which the warrant was based. The testimony at the second evidentiary hearing adduced the following facts.

Kalamazoo County Sheriff's deputies questioned defendant on October 14, 1980, and then released him. They gleaned from him his home address and then proceeded to his residence in Van Buren County in search of the automobile they suspected was involved in the fatal accident

*Recorder's Court judge, sitting on the Court of Appeals by assignment.

The officers parked their car in defendant's driveway and went to the front door to see if anyone was home. When they received no answer at the front door, they split up, one officer proceeding across the lawn toward the neighbor's house on the right, the other to the left. The avowed purpose in doing so was to ask the neighbors for a description of defendant's motor vehicle. Officer Boughton testified that as he was crossing the lawn he observed the top of a car in defendant's attached garage. He was 10 to 20 feet from the garage window and could not tell the kind of car nor the color. He called to Lt. Van Streain, the search warrant affiant, and proceeded closer to the garage to get a better look at the car. As he got close to the window he saw damage to the top of the windshield and the top of the right side of the vehicle. Van Streain, who was shorter, had to chin himself up to the window's ledge in order to peer into the garage and make the same observations.

Armed with this information, a search warrant was secured, the car was seized and this case unfolded.

The trial judge found that the officers could not see into the garage without getting very close to it. Further, he ruled that by walking onto defendant's property and looking into the garage the officers were committing a trespass.

On appeal, the prosecution argues that the officers committed no more than a technical trespass, that defendant had no reasonable expectation of privacy in his garage and that the car was in "plain view". A similar argument was made and rejected by the majority in , People v Dugan, 102 Mich App 497, 506; 302 NW2d 902 (1980), lv den 411 Mich 989 (1981);

"Although Officer Thompson clearly had probable cause to believe the snowblower was evidence of a crime, at the time he observed the snowblower he was not legally in a place he had a right to be. Defendant had a reasonable expectation of privacy in the land surrounding his house and in his garage, and, accordingly, was entitled to be free from unreasonable governmental instrusion into these areas. [Citations omitted.] There was no testimony to indicate that the snowblower could be seen from outside of defendant's property. In the

absence of a warrant, consent, exigent circumstances, or some other circumstance rendering the instrusion reasonable, the officer was not entitled to be where he was when the snowblower was discovered. Alternatively, the discovery of the snowblower cannot be considered inadvertent. It is clear that when Officer Thompson arrived at the East Outer Drive address he was looking for the missing snowblower."

We believe the analysis in Dugan is constitutionally sound and controlling in the present case. This Court reverses a trial court's decision to suppress evidence only if that decision is clearly erroneous. People v Bandy, 105 Mich App 240, 244; 306 NW2d 465 (1981), lv den 413 Mich 909 (1982). We find no error in the trial court's decision in this case.

The prosecution has also urged that we adopt the "inevitable discovery" doctrine of Nix v Williams, ___ US ___; 104 S Ct 2501; 81 L Ed 2d 377 (1984). We decline to address that issue because it is plain from this record that no facts were adduced to support a claim that the damaged vehicle would have been inevitably discovered.

AFFIRMED.

/s/ Myron H. Wahls
/s/ Glenn S. Allen, Jr.
/s/ Justin C. Ravitz